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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 625

THE GEORGIA RAILWAY AND ELECTRIC COMPANY, GEORGIA RAILWAY AND POWER COMPANY, and GEORGIA POWER COMPANY,

Appellants,

vs.

CITY OF DECATUR,

Appellee.

BRIEF OF APPELLEE, CITY OF DECATUR.

JAMES A. BRANCH,
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SCOTT CANDLER,
Attorneys for Appellee.

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GEORGIA RAILWAY AND POWER COMPANY,
and GEORGIA POWER COMPANY

APPELLANTS

vs.

CITY OF DECATUR

APPELLEE

BRIEF OF APPELLEE.

I.

JURISDICTION.

Appellee filed a statement opposing jurisdiction and a motion to dismiss or affirm upon the grounds:

(a) That there is no substantial Federal question involved; and,

(b) That the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

A brief in support of said motion was also filed.

In addition to the reasons set forth in the motion and brief above referred to, we urge the reasons, and rely upon the authorities, set out in section IX of this brief.

We respectfully insist upon said motion for the reasons set forth in the brief filed in support thereof and in this brief.

II.

The Decision of the Supreme Court of Georgia, Now Under Review, Is Not Inconsistent With the Mandate and Opinion of This Court. The Mandate, While Reversing the Judgment of the Supreme Court of Georgia, Left the Tribunals of the State at Liberty to Exercise Their Proper Jurisdiction in the Case Between the Parties.

The case was remanded to the Supreme Court of Georgia "for further proceedings not inconsistent with the opinion of this Court." (Record, page 128.) The mandate is, of course, construed in the light of the opinion of this Court. The opinion (295 U. S. 165) established two propositions only:

first: that the Supreme Court of Georgia, in its former decision, which was then under review, had "held that the state statute which authorized, and the ordinance which directed, an assessment for the cost of improvements require, as the basis for their operation, the existence of benefits"; and;

second: that "under the statute and ordinance *thus construed,*" the refusal of the state court to receive or consider any proof whatever on the subject of benefits, or lack of benefits, amounted to a denial of a hearing on that issue in contravention of the due process of law clause of the Constitution.

The decision of this Court did not preclude the supreme court of the state from further considering the case; or from further construing the state statutes and ordinance; or from correcting any error which it may have made in its former decision as to the proper construction of the statutes and ordinance. On the contrary, the case was remanded to that court for further proceedings; and it was at liberty, under the decision of this Court, to proceed in any manner, provided such proceedings were not inconsistent with the decision of this Court.

This Court did not construe, or undertake to construe, the Georgia statutes, but construed the opinion and decision of the Supreme Court of Georgia. This Court has uniformly

recognized that it is the province of the highest court of the state to construe the statutes of such state and that such construction will be accepted by this Court; and this Court recognizes the right of the highest court of the state to change its construction of the statutes of the state, and the last construction of such statutes by the highest court of the state is accepted as the true construction. See authorities on this proposition, section IV of this brief.

The mandate of this Court did not require that the cause be remanded to the trial court. In the assignment of errors (Record, page 151) and in their brief, appellants contend that the opinion and mandate "ordered a reversal" and that the state supreme court was therefore required by this Court to reverse the decision of the trial court and remand the case to the trial court. The mandate contains no such direction (Record, page 127, et seq.). The further proceedings to be taken in the cause were left to the state courts.

Schneider Granite Company v. Gast Realty & Invest. Company, 245 U. S. 288, 291.

These are state questions as to which the decision of the state court is controlling.

St. Louis & K. C. Land Co. v. Kansas City, 241 U. S. 419.

The further proceedings in the Supreme Court of Georgia, after the case was remanded, were had after due notice was given to the appellants. In the assignment of errors (Record, page 153) appellants allege: "The Supreme Court of the State of Georgia * * * without notice to the Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, entered a judgment of affirmance in said case." The record shows the contrary. A motion was made before the Supreme Court of Georgia for further consideration of the case and further construction of the statute, and this motion was duly served upon the appellants. (Record, pages 162-165.) This motion, and the acknowledgment of service thereof, were incorporated in the record at the request of the appellee. (Record, pages 161-

162.) "The Power Company resisted this motion" before the Supreme Court of Georgia (Record, page 133).

> "The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court, *(Re Sanford Fork & Tool Co.,* 160 U. S. 247, 256); and the opinion of this court may be consulted to ascertain exactly what was decided."
>
> *Ex parte Union Steamboat Company,* 178 U. S. 317, 319.

> "The mandate while reversing the judgment that was under review on the former writ of error, permitted further proceedings of any kind to be had in the state courts, provided they were not inconsistent with the opinion of this Court. It left the tribunals of the state at liberty to exercise their proper jurisdiction in the cause between the parties."
>
> *Schneider Granite Company v. Gast Realty & Investment Company,* 245 U. S. 288, 290.

> "While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded,—even though all are not specifically referred to in the opinion, —yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. An actual decision of any question settles the law in respect thereto for future action in the case."
>
> *Mutual Life Insurance Company v. Hill,* 193 U. S. 551, 553.

In *General Investment Company v. Lake Shore & Michigan Southern Railway Company,* 260 U. S. 261, it was held that a

judgment of the Supreme Court of the United States reversing an order dismissing a bill because a person originally made a defendant, but who had been dismissed from the suit, is an indispensable party to the action, does not preclude the lower court from dismissing the bill because not stating a cause of action.

In *Hartford Life Insurance Company v. Blincoe,* 255 U. S. 129, it was held:

> "A decree of the Federal Supreme Court which, upon the ground that full faith and credit were denied to a judgment of a sister state holding that a life insurance company could levy an assessment for a larger amount than was necessary to pay death losses up to the time, reversed a decree of the highest court of another state, holding that a benefit certificate in such company was not forfeited for non-payment of such an assessment, which that court found to be excessive, leaves the latter court at liberty to decide (upon the authority of its previous decisions) on a second appeal following a new trial of the cause that a tax asserted by the Company to have been imposed by the laws of the state had been unlawfully included in the assessment, and that therefore the assessment was void, and that its non-payment did not work a forfeiture of such benefit certificate."

To the same effect, see:

Ward v. Board of County Commissioners of Love County, 253 U. S. 17, 25;

Wolff Packing Company v. Court of Industrial Relations, 267 U. S. 552, 562;

General Investment Company v. Lake Shore & M. S. Ry. Co. (C. C. A. Sixth Circuit), 269 Fed. 235 (5);

Iowa Central Railway Co. v. Walker (C. C. A. Eighth Circuit), 255 Fed. 648;

McNee v. Williams (C. C. A. Eighth Circuit), 280 Fed. 95;

E. E. Taenzer & Co. v. Chicago, R. I. & P. Ry. Co. (C. C. A. Sixth Circuit), 191 Fed. 543;

Great Northern Ry. Co. v. Western Union Telegraph Co. (C. C. A. Eighth Circuit), 174 Fed. 321;

Hayat Carpet Cleaning Co. v. Northern Assur. Co., Limited of London, 69 Fed. (2d) 805;

Chase v. United States (C. C. A. Eighth Circuit), 261 Fed. 833.

In *Clark v. Williard,* 292 U. S. 112, this Court expressly recognized the propriety of the highest court of the state being permitted to pass upon the laws and local policies of the state as expressed in its statutes; and, after reversing the case on other grounds, remanded the case to the Supreme Court of Montana in order that that court might further consider such questions. Mr. Justice Cardozo in the opinion (page 123) said:

> "Whether there is in Montana a local policy, expressed in statute or decision, whereby judgments and attachments have a preference over the title of a charter liquidator is a question as to which the Supreme Court of that state will speak with ultimate authority."

Mr. Justice McReynolds, in a separate opinion in that case, (page 139) said:

> "It is not our function to suggest to state courts how they should interpret their own laws."

The case was again carried to the Supreme Court of the United States and the judgment of the Supreme Court of Montana was then affirmed. *Clark v. Williard,* 294 U. S. 211.

III.

The Supreme Court of Georgia Was Not Precluded Either by the Decision of This Court or by the Rule of "The Law of the Case" From Construing the Statute and Ordinance as it Did in its Last Decision.

> "In the absence of statute the phrase 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to re-

fuse to re-open what has been decided, not a limit to their power."

Messinger v. Anderson, 225 U. S. 436, 444.

"The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and *res judicata;* one directs discretion, the other supersedes it and compels judgment. In other words, in one it is a question of power; in the other, of submission."

Southern Railway Company v. Clift, 260 U. S. 316, 319.

This rule is now well established and is generally recognized.

"What is called the 'law of the case' is only a rule of convenience, generally adhered to, of course, but not necessarily.

"The appellate court by such former decision did not preclude itself from doing justice between the parties; if it should be convinced that its former decision was erroneous." *Messinger v. Anderson,* 225 U. S. 436; *Lewers & Cooke v. Atcherly,* 222 U. S. 285, 295; *Hertz v. Woodman,* 218 U. S. 205."

Chase v. United States, 261 Fed. 833, 840.

"Notwithstanding the rules as to *stare decisis,* and that a decision of an appellate court becomes the law of the case on retrial, the Circuit Court of Appeals may, where former decision in the same case was clearly erroneous, and announced a wrong rule, which might well affect many persons adversely, reverse its earlier decision on writ of error after retrial; the rule as to the law of the case being largely one of convenience and policy."

Johnson v. Cadillac Motor Company (C. C. A. Second Circuit), 261 Fed. 878.

"Decision on former appeal does not deprive court of power to review questions involved and reach another result."

Williams v. Order of Commercial Travelers of America (C. C. A. Sixth Circuit), 41 Fed. (2d) 745.

"An appellate court by its decision does not preclude itself from doing justice between the parties, if on a subsequent appeal it should be convinced that its former decision was erroneous."

Chase v. United States (C. C. A. Eighth Circuit), 261 Fed. 833.

"While the Circuit Court of Appeals has power under special circumstances to re-examine questions decided on previous hearing of same case, decision on former appeal or writ of error is, as a general rule, the law of the case."

Texas v. Pensacola Maritime Corporation (C. C. A. Fifth Circuit), 292 Fed. 61.

"Circuit Court of Appeals will not consider itself bound by law of case if former decision is clearly erroneous or unjust."

American Surety Company v. Bankers Savings & Loan Association (C. C. A. Eighth Circuit), 67 Fed. (2d) 803.

See also:

Higgins v. California Prune & Apricot Grower (C. C. A. Second Circuit), 3 Fed. (2d) 896;

Rogers v. Chicago R. I. & P. Railway Company (C. C. A. Eighth Circuit), 39 Fed. (2d) 601.

The Supreme Court of Georgia, in the decision now under review, says that that court in rendering its former decision did not intend to construe the state statute which authorized, and the ordinance which directed, the assessment to require, as the basis for their operation, the existence of benefits as to a street railway company having tracks in the street improved. This being true, the court ought to have the power to so hold, notwithstanding its unintentional use of language to the contrary effect in its former decision.

Compare: *Barney v. Winona & St. P. Railroad Co.*, 117 U. S. 228.

The case was still pending between the parties and no rights of the parties had been acquired or relinquished by reason of reliance upon the decision. What reason, we respectfully ask, could there be for denying the highest court of the state the power to construe a state law correctly according to its views, even though it had once before given the law an erroneous construction, and one not intended by the court? If this Court had itself construed the state statute and the state supreme court had afterwards given it a different construction, this Court would adopt the latter construction.

Chicago, M., St. P. & P. Railway Company v. Risty, 276 U. S. 567, 570;

Green v. Neal, 6 Pet. 291;

Leffingwell v. Warren, 67 U. S. (2 Black) 599, 603.

The mandate of this Court did not direct the state supreme court to adhere to its own former construction of the statute. It did not command the state court not to correct its own error, if such existed.

IV.

The Supreme Court of the United States Accepts the Construction by the Highest Court of the State of a Statute of Such State; and the Last Construction of Such Statute by the Highest Court of the State is Accepted, Even Though the Statute Had Formerly Been Given a Different Construction.

If, as we insist, the mandate and opinion of this Court did not have the effect of preventing the Supreme Court of Georgia from further considering and construing the statute, then its last decision will be accepted by the Supreme Court of the United States as the true construction of the statute, and that construction becomes a part of the statute as much as though it were found in appropriate words in its text.

Georgia Railway & Electric Company v. Decatur, 295 U. S. 165, 170.

It is the latest construction that is accepted by this Court.

In *Leffingwell v. Warren,* 67 U. S. (2 Black) 599, 603, it was held:

> "The construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as a part of the statute, and is as binding upon the courts of the United States as the text * * * If the highest judicial tribunal of a state *adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications. United States v. Morrison,* 4 Pet. 124; *Green v. Neal,* 6 Pet. 291." (Italics ours.)

In *Green v. Neal,* 6 Pet. 291, 292, this Court held:

> "If the construction of the highest judicial tribunal of the State forms a part of the statute law as much as an enactment by the Legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply where the judicial branch of the State government, in the exercise of its acknowledged functions, should, by construction, give a different effect to a statute from what had at first been given to it. The charge of inconsistency might be made with more force and propriety against the federal tribunals for a disregard of this rule, than by conforming to it. They profess to be bound by the local law, and yet they reject the exposition of that law which forms a part of it. *It is no answer to this objection that a different exposition was formerly given to the act which was adopted by the federal court. The inquiry is, what is the settled law of the State, at the time the decision is made?* This constitutes the rule of property within the State, by which the rights of litigant parties must be determined.
>
> "As the federal tribunals profess to be governed by this rule, they cannot act inconsistently by enforcing it. If they change their decision, it is because the rule on

which the decision was founded has been changed." (Italics ours.)

In the opinion, on page 299, Mr. Justice McLean said:

> "Would not a change in the construction of a law of the United States by this tribunal be obligatory on the State courts? The statute, as last expounded, would be the law of the Union; and why may not the same effect be given to the last exposition of a local law by the State Court? The exposition forms a part of the local law, and is binding on all people of the State and its inferior judicial tribunals. It is emphatically the law of the State; which the federal court, while sitting within the State, and this court, when a case is brought before them, are called to enforce. If the rule as settled should prove inconvenient or injurious to the public interests, the Legislature of the State may modify the law or repeal it."

In *Elmendorf v. Taylor,* 10 Wheat. 152, 159, Chief Justice Marshall said:

> "This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the constitution and laws of the United States is received by

all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled."

This Court holds itself bound by the decision of the highest court of a state construing a state statute even though that construction is contrary to the weight of authority.

Marine National Exchange Bank v. Kalt-Zimmer Mfg. Co., 293 U. S. 357, 366.

And this is true even though such construction may not accord with this Court's opinion as to the proper construction.

Supervisors of Carroll County v. United States, 85 U. S. (18 Wall.) 71;

Forsyth v. Hammond, 166 U. S. 506, 518;

Hartford Life Insurance Company v. Blincoe, 255 U. S. 129, 138.

And this is also true even though this Court had previously construed the state statute differently.

Chicago, M., St. P. & P. R. Co. v. Risty, 276 U. S. 567, 570.

Compare:

Sioux County v. National Surety Co., 276 U. S. 238;

Hawks v. Hamill, 288 U. S. 52.

See also:

Fairfield v. County of Gallatin, 100 U. S. 47;

Mackay Telegraph & Cable Company v. Little Rock, 250 U. S. 94;

Farncomb v. City and County of Denver, 252 U. S. 7.

V.

The Statutes (Ga. Laws 1919, pp. 934 et seq; Ga. Laws 1924 pp. 534 et seq.), Which Authorized the Assessments Against Appellants for a Part of the Cost of Improving the Streets Occupied by Their Tracks, as Construed by the Supreme Court of Georgia, Do Not Require, as the Basis for Their Operation, the Existence of Special Benefits to the Property of Appellants.

The Supreme Court of Georgia in its decision rendered September 30th, 1935 (Record, page 129 et seq.), held:

> "2. The City of Decatur, under the constitution and general law of this State and under its charter and the amendments thereof, had legislative authority to pave its streets and to assess a portion of the costs of such improvement against the street-railway company occupying and using, with the consent of the city, the street paved, irrespective of benefit to the company. This authority comes both within the taxing and the police power reserved in the State."

In the opinion (Record, pages 136-7) the Court said:

> "When the Georgia Power Company was organized and chartered, the general law of the State, enacted under the State constitution, in reference to street and interurban railways expressly stipulated: 'Provided that no street railroad or interurban railroad incorporated under this chapter shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities; and provided further that all railroad companies incorporated under this chapter shall be subject to all just and reasonable rules and regulations by the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them with reference to the railroad or the properties thereof located within the limits of said municipal corporation.' Code of 1933, section 94-1002. The City of Decatur was duly incorporated by act of the General Assembly. By legislative acts approved August 18, 1919, and August 12, 1924, (Ga. L. 1919, p. 934; 1924, p.

534), amending the charter of the City of Decatur, the General Assembly of this State conferred full power and authority upon the city, in the discretion of its commissioners, to pave any street therein, and, when street-railway tracks are located in a street ordered paved, to assess the cost of paving of that portion of the street between and for two feet on each side of said tracks against the company owning the tracks, and to assess the remainder of such costs against the abutting property. When the Georgia Power Company accepted its charter and with the consent of the city entered on its streets with its railway-tracks, it did so subject to the general law of the State and to the power of the State to amend the city charter by further legislation dealing with the upkeep of the streets. Under its laws the State reserves the power and authority to withdraw, alter, or amend private charters. Under the laws of this State this legislation was authorized. The Code of 1933, section 79-101, provides: 'Persons are either natural or artificial. The latter are creatures of the law, and, except so far as the law forbids it, subject to be changed, modified, or destroyed at the will of their creator; they are called corporations.' And 'In all cases of private charters granted since January 1, 1863, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter.' Section 22-1202.

"So when the Georgia Power Company was organized and with the consent of the city entered on the streets with its railway-tracks, it did so subject to the general law of the State and the power of the State to amend the city's charter by further legislation with respect to the upkeep of the streets."

VI.

The Statutes Under Which the Assessment Against the Appellants Was Made, as Construed by the Supreme Court of Georgia, Does Not Deprive Appellants of Any Right Guaranteed Them by the Constitution of the United States; But Such Statutes are Valid as an Exercise of the Power Reserved by

the State to Alter or Amend Private Charters, and of the Police Power of the State.

It is well settled by the decisions of this Court that assessments against street railway companies for street improvements, in respect of streets occupied by their tracks, are sustainable, not upon the theory of special benefits to their property (as in the case of abutting owners), but upon the principle that the state has the power to make reasonable classifications, and to impose different burdens upon different classes, and the power to alter or amend corporate charters.

Fort Smith Light & Traction Company v. Board of Improvement of Paving District No. 16 of Fort Smith, 274 U. S. 387;

Fairhaven & Westville Railroad Company v. City of New Haven, 203 U. S. 379;

Sioux City Street Railway Company v. Sioux City, 138 U. S. 98;

Durham Public Service Company v. City of Durham, 261 U. S. 149.

In *Fort Smith Light & Traction Company v. Board of Improvement of Paving District No. 16 of Fort Smith, supra,* it was held:

> "Constitutional power reserved to the legislature to alter any corporate charter permits the imposition upon a street railway company of the cost of street paving without violating the constitutional provision against impairing the obligation of contracts, although the provision was not in its franchise contract.
>
> "The imposition upon a street railway company of the cost of street paving which its franchise contract does not require it to meet does not unconstitutionally deprive it of property without due process of law, since it might have been included in the original charter, and has a reasonable relation to the object of the grant and the duty of the state to maintain its highways."

In *Fair Haven & Westville Railroad Company v. City of New Haven, supra,* it was held:

> "The imposition upon street railway companies by Conn. act of July 1, 1895, of the cost of paving and repaving that part of the streets occupied by their tracks, is a valid exercise of the power reserved by the state to alter or amend the charter of a street railway company, which required such company to keep the street between its tracks and 2 feet on each side in good and sufficient repair." (Headnote 2.)

In the opinion by Mr. Justice McKenna, it was said:

> "Does the change and increase of burden upon the plaintiff in error come within the limitations upon the reserved power of the state? Has it no proper relation to the objects of the grant to the company or any of the public rights of the state? Can it be said to be exercised in mere oppression and wrong? All of these questions must be answered in the negative. The company was given the right to occupy the streets. It exercised this right first with a single track, and afterwards with a double track. Before granting this right the state certainly could have, and reasonably could have, put upon the company the duty of paving as well as of repairing. Such requirement would have been consistent with the object of the grant. It is not imposed in sheer oppression and wrong, and the good faith of the state cannot be questioned. It is imposed in the exercise of one of the public rights of the state,—the establishment, maintenance, and care of its highways." (Pages 389, 390.)

In *Sioux City Street Railway Company v. Sioux City, supra,* it was held that under the provisions of the Iowa code:

> "the legislature has power to repeal and amend the articles of incorporation of a company, and to impose any conditions upon the enjoyment of its franchise which the General Assembly may deem necessary for the public good."

In the opinion, Mr. Justice Blatchford, on this subject, said:

> "The Company took its franchise subject to such legislation as the State might enact. This is plain from the provision of section 1090 of the Code. The Company took its charter subject to the provisions of that section. The General Assembly deemed it necessary for the public good to require street railways to pay for the paving of one foot outside of the tracks, probably upon the view that it was right that they should be required to pave that part of the street which they used almost exclusively. It was not in the power of the City, by any contract with the Company, to deprive the Legislature of the power of taxing the Company. * * *
>
> "Under section 1090 of the Iowa Code, the Legislature had the power not only to repeal and amend the articles of incorporation of the Company, but to impose any conditions upon the enjoyment of its franchise which the General Assembly might deem necessary for the public good. The reservation of this power was a condition of the grant." (Pages 106, 107.)

VII.

No Unfair Discrimination Against Appellants.

It is not unfair discrimination against a street railway company, which occupies with its tracks a portion of a street, to require such company to pay a fair portion of the cost of paving such street, although there is no immediate or direct benefit to its property on such street from such improvement, and although assessments against abutting property owners must be based upon special benefits to such abutting property.

> "The power of the legislature to make reasonable classifications and to impose a different burden upon the several classes cannot be denied. There are obvious reasons for imposing peculiar obligations upon a railway in respect of streets occupied by its tracks."
>
> *Durham Public Service Company v. City of Durham,* 261 U. S. 149, 154.

VIII.

The Fact That the Appellants, Because of the Five-Cent Fare Contract, Cannot Operate This Line at a Profit Affords No Reason for Relieving Them from the Payment of the Assessment.

In *Fort Smith Light and Traction Company v. Board of Improvement of Paving District No. 16 of Fort Smith*, 274 U. S. 387, it was held:

> "The imposition of burdens otherwise legitimate upon a public service corporation cannot be held invalid as confiscatory because the permitted rate for its service does not allow an adequate return, and therefore a street railway company cannot avoid payment of a street paving assessment because it loses money in the operation of its road at the rate allowed." (Headnote 4.)

In *Milwaukee Electric Railway & Light Company v. State of Wisconsin*, 252 U. S. 100, it was held:

> "A street railway company's contractual duty to repave that part of a street which lies between its tracks and for 1 foot outside cannot be evaded on the theory that this additional burden will reduce its income below a reasonable return on the investment." (Headnote 2.)

IX.

The Decision of the Supreme Court of Georgia Rests Upon an Independent Ground Not Involving a Federal Question and Broad Enough to Maintain its Judgment; That is, Upon the Ground of Estoppel; and, Therefore, the Judgment of That Court Should be Affirmed or the Appeal Dismissed Notwithstanding That There Was Also a Federal Question Involved.

The Supreme Court of Georgia in the decision now under review held (Record, page 130):

> "3. Where a city, in conformity to legislative authority and its ordinances, paved and incurred the expense of paving a street occupied by a street-railway company, and where the company, with knowledge that the city in-

tended, in conformity to its charter and ordinances, to charge the company with a part of the expense of such paving, stood by and saw the paving done and the expense incurred, without instituting any legal action to prevent the same, it was thereafter too late for such company to avoid payment on the ground that enforcement of the assessment will deprive the company of its property, in violation of the due-process clauses of the State and Federal Constitutions."

In the opinion, in discussing this question, the Court said:

"There is another cause, not inconsistent with the opinion of the United States Court, why the judgment of the lower court should be affirmed. The direction of the verdict was demanded. The paving in question was commenced in May, 1925, and completed in May, 1926. While the street-railway company protested against the pavement and threatened to abandon its line on account of same, yet it took no legal steps to prevent the paving. * * * At the time of the paving, which was done in accordance with the law, the street railway was being operated by the Georgia Railway & Electric Company. This company stood by and without any legal action permitted the paving and the expense thereof to be incurred, with knowledge that the city intended to hold it liable for a portion of such expense. Thereupon the paving assessment became a binding obligation upon the company. Afterwards this company merged into the Georgia Power Company, which company in the merger assumed to pay all assessments outstanding against the electric company. It is now too late to raise the question that the city abused its legislative discretion in ordering the paving and making the assessment for the costs thereof. The Georgia Power Company is estopped, by reason of the laches of the Electric Company in the premises, from making the defense offered against the payment of the assessment. This conclusion is in line with numerous decisions of this court."

The Supreme Court of Georgia also points out, in this and in its former decisions, that the only protest that was ever made by the power companies concerning the proposed paving of the street was to the effect that, because of the five-cent fare contract which the power companies had entered into with the City of Decatur, those companies were not able to operate this particular line at a profit, and should therefore not be required to bear their legitimate portion of the cost of paving the street, and they offered to surrender to the City of Decatur the franchise for this particular line and to abandon its operation. The power companies did not claim, or undertake to claim, in any protest made by them against the proposed paving, that the paving was not necessary or that the character of paving proposed was unreasonably expensive. They simply claimed that because of the five-cent fare contract they could not afford to pay their portion of the expense of the paving. The court also calls attention to the fact that the power companies undertook to abandon this line for the purpose of avoiding its obligations under the five-cent fare contract. The Supreme Court of Georgia had, in a previous decision (*Georgia Power Company v. City of Decatur,* 168 Ga. 705), held that "to allow the power company to surrender its franchise or permit and to tear up its tracks would in effect be to allow that company to terminate a contract which has been held valid and which is binding upon the power company because of its relation to the corporation which entered into the contract and received the benefits thereof; and this cannot be done because of the law which makes a valid contract effective according to its terms." In the opinion (168 Ga. 705), it was recited: "This suit had its origin in the decision of the City of Decatur in 1925 to pave its streets in accordance with an act of the legislature of Georgia and to assess certain of the expense of paving against the street railway. On July 9th, 1925, plaintiff in error notified the City of Decatur that unless it was relieved of the burden of this paving expense it would be 'willing to surrender to the City of Decatur the franchise for this line and remove the tracks from the street.' The City refused this proposition."

The Supreme Court of the United States in *Georgia Power Company v. Decatur,* 281 U. S. 505, 511, in reviewing the decision of the Supreme Court of Georgia (168 Ga. 705), held: "The losses attributable to the stretch of track in question and the five-cent fare are immaterial while the rate contract continues," and affirmed the judgment of the Supreme Court of Georgia enjoining the Power Company from abandoning the operation of this line.

The acts of the Legislature under which the paving assessment was made (Georgia laws 1919, page 934 et seq.; Georgia laws 1924, page 534 et seq.) provide for the giving of notice before the paving ordinance is adopted and for a hearing on the proposed ordinance so as to permit any person to be affected to contest the proposed plan.

> "A judgment of a state court based upon an estoppel on general principles of law and a statute of the state, irrespective of any Federal question, as an independent ground broad enough to maintain its judgment, cannot be reviewed in this court on writ of error, although a federal question was also decided."
>
> *Gillis v. Stinchfield,* 159 U. S. 658.

> "This court will not entertain jurisdiction of a state judgment, where, besides the federal question alleged to have been decided by the state court, it proceeded in part upon another and distinct ground not involving any federal question and sufficient in itself to maintain the judgment without reference to that question."
>
> *Beaupre v. Noyes,* 138 U. S. 397.

> "Where a finding, which does not involve a federal question, is broad enough to maintain the decree, even though the federal question involved in another defense was decided wrong, this court will affirm the decree, without considering that question or expressing any opinion upon it."
>
> *Jenkins v. Lowenthal, et al.,* 110 U. S. 222.

"The question of the estoppel of a party to deny the validity of a mining location does not constitute a federal question for review by the Supreme Court of the United States on writ of error to a state court."

Speed v. McCarthy, 181 U. S. 269.

To the same effect, see also:

Gaar Scott & Company v. Shannon, 223 U. S. 468;

Moran v. Horsky, 178 U. S. 205;

Northern Pacific R. Co. v. Ellis, 143 U. S. 458;

Rector v. Ashley, 73 U. S. (6 Wall.) 142;

Hale v. Akers, 132 U. S. 554.

It does not matter that the Supreme Court of the United States may think the state court wrong in believing that there is evidence to support the decision on the non-federal ground.

Leathe v. Thomas, 207 U. S. 93;

Eustis v. Bolles, 150 U. S. 261.

"A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute, and the question whether he has or has not lost such right by his failure to act, or by his action, is not a federal one."

Pierce v. Somerset Railway, 171 U. S. 641, 648.

To the same effect, see:

McGregor v. Hogan, 263 U. S. 234;

First National Bank v. Board of County Commissioners of the County of Weld, 264 U. S. 450;

Chicago, M., St. P. and P. R. Company v. Risty, 276 U. S. 567, 575.

Appellants, in their brief, (page 24) and "Appendix A," refer to certain extracts from a brief which they say was filed in the Supreme Court of Georgia by counsel for the City of

Decatur in *Georgia Power Company v. City of Decatur,* 168 Ga. 705. This, of course, is outside of the record. We merely call the Court's attention to the fact that the present counsel representing the City of Decatur were not of counsel in that case, as shown by the official report of the decision. (168 Ga. 705.)

Respectfully submitted,

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